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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 407

RALPH NEELY,

Petitioner,

v.

HOUSTON OILERS, INC.,

Respondent.

RESPONSE TO BRIEF IN OPPOSITION

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I.

Petitioner accepts the statement made by Respondent that the granting of a Writ of Certiorari is not a matter of right but of sound judicial discretion on the part of this Court and likewise Petitioner accepts the quotation by Respondent from *National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U.S. 498, because the application which Petitioner has brought before this Honorable Court comes absolutely within the elements of this quotation.

However, Petitioner cannot accept as true the other statements made in the argument by Respondent because Respondent wanders off and studiedly refuses to face the actual

conflict of the instant case and the *New York Football Giants* case. Judge Picket notes, for the Court below, the conflict of opinion with the *New York Football Giants* case saying,

> " * * * it is urged that when Houston participated in a scheme to conceal that fact for the purpose of permitting an ineligible player to participate in a post-season game, it was such deceit upon others that a court of equity should not intervene to assist in the enforcement of the contract. With this argument we cannot agree." (Appendix C-12 of Petition)

and then saying:

> "But if the rule announced in that case was intended to apply to every instance in which a contract is entered into with a college football player before a post-season game with the understanding that it be kept secret to permit that player to compete in the game, then we must respectfully disagree with the conclusion." (Appendix C-13 of Petition)

Respondent argues that there was a finding of fraud in the *New York Football Giants* case, but even a casual reading of the Fifth Circuit opinion will show that the learned Chief Judge Tuttle considered only the "clean hands" doctrine in disposing of the matter. He said,

> "Here the plaintiff's whole difficulty arises because it admittedly took from Flowers what it claims to be a binding contract, but which it agreed with Flowers it would, in effect, represent was not in existence in order to deceive others who had a very material and important interest in the subject matter." (Appendix D-8 of Petition)

The undisputed testimony of all parties in the instant case reflects that it was agreed by the parties to keep the Neely contract secret so that he could play in the bowl game.

This was the same deceitful arrangement condemned by the Fifth Circuit. Why should a different standard of moral conduct be proclaimed in the Tenth Circuit? Such holding has created embarrassment throughout the sports world, disturbed all college athletic associations, and will continue, unless corrected, to create and reflect different standards in moral conduct and equity principles throughout the jurisprudence of our land.

In passing on the doctrine of clean hands, every court or tribunal must question its own equitable standards. What are its standards? Will it permit a plaintiff to come in and ask for an injunction when such plaintiff admits that it agreed to keep a contract secret from the *public* and *all others interested* and to pretend that such contract did not actually exist in order to perpetrate *a fraud upon the universities* and upon all parties interested in *clean* football and *clean* sports throughout the land? The agreement to deceive and the actual attempt at deceit is not denied. *Respondent does not even question the agreement to deceive in its reply.* Can there be a more flagrant violation of the principles of equity?

II.

Petitioner respectfully asks consideration of a discussion of the conflict between the decision below and *New York Football Giants* case because Respondent's brief insists that they are distinguishable on the facts; though the facts upon which the decision are based are identical.

The Respondent discusses a material misrepresentation to Flowers by Mara, owner of the Giants, which Respondent

claims was the basis of the decision. The so-called material misrepresentation is not identified by Respondent but apparently is the agreement of Mara not to submit the contract to the Commissioner. The trial court in the *New York Football Giants* case based its decision on this ground but the Fifth Circuit *expressly* excluded it as a basis of its decision. The Fifth Circuit held that the trial court was wrong to ever reach such a determination and that the "clean hands" doctrine should be applied before reaching any legal determinations. (Appendix D-6 of Petition)

The deceit which required the Fifth Circuit to apply the "clean hands'" doctrine had nothing to do with any misrepresentation between Flowers and Mara. The deception was that practiced by *both* Flowers and Mara. The decision talks of "the deceit agreed to between the parties" (Appendix D-5 of Petition); "the deception proposed by the Giants and entered into by him" (Appendix D-5 of Petition); "in order to deceive others who had a very material and important interest in the subject matter" (Appendix D-8 of Petition); and, "the pretended status which it has foisted on the public" (Appendix D-8 of Petition). Nowhere is the decision concerned with any misrepresentation to Flowers and such alleged fact forms no basis for the decision.

Another fact difference urged by Respondent is that the contract in the instant case did not require approval by the Commissioner. Once again this factual distinction was expressly eliminated from the decision of the Fifth Circuit

by its refusing to consider the legal issues on the merits (Appendix D-6 of Petition) and modifying the decision of the trial court to the extent it had considered such facts. (Appendix D-8 of Petition)

The other distinction between the two conflicting cases urged by Respondent concerns Flowers' playing and Neely's not playing in the games. Flowers' playing or not playing was in no way involved in the decision of the Fifth Circuit. The *deceit* was the agreement to keep the contract secret, the representation that it was not in existence. (Appendix D-8 of Petition) The conduct of the Respondent in the instant case was identical to that of the Giants in the conflicting case. The fact of Neely's playing or not playing could have no importance in the case at bar because it is elementary that it is the conduct of the *plaintiff* which dictates whether or not the "clean hands" doctrine will be applied.

III.

The intercollegiate athletic associations and all other associations and parties connected with our great sports world have endeavored to keep the sports picture clean and above suspicion of fraud, deceit and cheating. It is true that in baseball we had our scandal, but each of the violators was banished from sports and the public eye into obscurity. It is true that one of our great Olympic heroes had to return his medals, but he suffered and was chastised in spirit for the balance of his life. But for the first time one of our great courts has issued a hunting license *to hunt the amateur* so that the professional teams with coffers full of money may prey upon the amateur athletes and hold before them im-

mense salaries which would almost corrupt the most stalwart exponent of integrity.

No other court has ever sustained a contract conceived in deceit and an agreement to hide from the public, the universities and other promotors of integrity in athletics, the conniving plan here fostered. It is true that the Tenth Circuit must have been impelled by some reason to overrule its own decisions about the duty of the appellate court to follow the findings of fact of the trial judge and thus refuse to sustain a single material finding that the learned judge had made while looking at the witnesses. Whatever the reason, here stands an opinion setting aside all of the findings of the trial judge and overruling an opinion of another circuit that will be remembered with regret and chagrin unless it is overturned. The opinion of the Fifth Circuit must survive and the principles of truth and integrity there proclaimed will resound and repeat themselves in the lives of all those who follow us throughout generations yet unborn.

"Oh what a tangled web we weave when first we practice to deceive". Will this become a way of life? Will we reward such chicanery? The answer should be clear.

IV.

In reply to the contention of Respondent that the Statute of Frauds of the State of Texas has not been violated and that Ada Oil Company is not an indispensable party, Petitioner does not care to belabor the questions because they are fairly presented in the application and a reading of the

cases therein cited is a complete answer to Respondent's endeavor to claim that:

(1) Ada Oil Company is bound by the judgment and would be forced to perform thereunder though not a party to the suit; and

(2) this Honorable Court must presume that Ada Oil Company, though not a party, and the Houston Oilers, though pleading guilty to a deceitful arrangement in securing the contract, *must be trusted* by the Court to treat the Petitioner fairly.

If Petitioner is enjoined, who will compel Ada Oil Company to comply with the contract? Who will fill in the blanks in the unknown lease or leases to be executed? These questions answer themselves. We respectfully refer to the manner in which these points are covered in the original application.

WHEREFORE, Petitioner prays that the Writ of Certiorari be granted.

Respectfully submitted,

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JAMES D. FELLERS,

J. HOWARD EDMONDSON,
Counsel for Petitioner.

August 31, 1966